Imagining judges in a written UK Constitution

verfassungsblog.de/imagining-judges-written-uk-constitution/

The tide of interest (among those who care about these things) in the idea of a written, codified constitution for the United Kingdom rises and falls. At the moment the tide is quite high, but certainly not high enough to flow into the estuaries of government policy making.

In 2010, Richard Gordon QC —a public law scholar-practitioner at Brick Court Chambers, London —wrote a book length blue print for a codified constitution (though expressing himself tentatively in terms of aiming to stimulate a debate). In *Repairing British Politics*, he rejects parliamentary supremacy as a defining principle and envisages judges having broad and deep powers to enforce the constitution. As my Essex colleague Anthony King put it in a review of the book: "By implication — and notwithstanding a passing reference to 'the available resources of the State'— unelected judges would even have the power to order other authorities to provide citizens with the aforementioned food, water, clothing, housing and free health and social care services".

Meanwhile, across the road at the LSE, Conor Gearty is leading a "trailblazing project that invites members of the public to participate in, offer advice on and eventually to draft a new UK constitution through crowdsourcing". On Thursday 26 June 2014, the project will be hosting a "Constitutional Carnival"when "All those involved in the project, and many others joining for the first time, will be invited to come together to have their say on what should be included in a UK constitution". One session will be on "Where should judges fit in a written constitution?". It will be interesting to see what emerges.

The latest contribution to the debate comes today from the House of Commons Political and Constitutional Reform Committee, which publishes its report on *Constitutional role of the judiciary if there were a codified constitution* (14th report of Session 2013-14, HC 802). Chaired by veteran Labour MP Graham Allen, this cross-party select committee has been toiling away since it was set up in June 2010 "to consider political and constitutional reform, scrutinising the work of the Deputy Prime Minister in this area". Two major planks of Nick Clegg's agenda have fallen off the lorry since then: House of Lords reform and an alternative vote electoral system for the House of Commons. With time on its hands to mull over the bigger picture, the PCRC launched a wide ranging inquiry in September 2010 on "Mapping the path to codifying — or not codifying — the UK's Constitution", supported by researchers at the Centre for Political and Constitutional Studies at King's College London. Today's report on the role of the judiciary is one aspect of that inquiry.

The PCRC's report starts by acknowledging that the British judiciary already have a role in relation to constitutional matters, quoting examples I gave in my written evidence:

> *determining legal disagreements about the respective powers of different institutions within the constitution, for example between the UK Parliament and the UK Government, or between the central and local government;*
>
> *dealing with legal questions about the division of powers between the UK and the European Union, under the guidance of preliminary rulings by the European Court of Justice;*
>
> *adjudicating on legal questions about the exercise of powers by executive and legislative institutions in Scotland, Wales and Northern Ireland in accordance with the devolution settlements created by the UK Parliament;*
>
> *protecting fundamental rights of individuals, including those in the Human Rights Act 1998, taking into account the case law of the European Court of Human Rights. […]*
>
> *judicial review of executive action and delegated legislation, ensuring that public bodies remain within the powers conferred on them by Acts of Parliament and operate in accordance with judge-made legal principles of (for example) fairness and rationality.*

The report goes on to “welcome the fact that the Constitutional Reform Act 2005 enshrined judicial independence in law”.

From there, however, the committee feels unable to say much more about what would change, in relation to the judiciary, if there were to be a written constitution:

> *The role of the judiciary would undoubtedly change should the UK adopt a codified constitution, but the precise nature of that change will be difficult to assess until there is an agreed definition of the current constitutional role of the judiciary. In our terms of reference we set out to explore the current constitutional role of the judiciary but this needs further work.*

That’s quite right. There are a number of different ways in which the British constitution could be “written”and each model —including a non-legal constitutional code, a consolidation Act bringing together current statute law on the constitution into a single enactment, and a full blown constitution —would have different implications for the role of judges.

Having rehearsed some well trodden pros and cons of parliamentary supremacy (and whether it should or indeed could be retained in a written constitution), the PCRC expresses interest in the idea (which I share) of a “declaration of constitutionality” modelled on similar lines to section 4 of the Human Rights Act 1998, which would give courts power to declare that an Act of Parliament is inconsistent with a norm of the constitution without striking down the offending provision. It would then be left to government and Parliament to decide how to respond.

In a statement that will I’m sure provide inspiration to setters of undergraduate essay questions in years to come, the committee states “Before the UK could move towards a codified constitution there would need to be a precise definition of the ‘rule of law”’. I am not sure that is right: arguably, the committee gets this back to front. A better way of understanding the umbrella concept of the rule of law is to say that it includes what is written down in a constitution.

Sharing a view previously expressed by the House of Lords Constitution Committee, the PCRC shows little appetite courts having power to undertake pre-enactment review of legislation. Nor is there much support for setting up a specialist constitutional court: based on the evidence received (including mine), the report concludes that “the Supreme Court could adjudicate on constitutional matters”.

All in all, it is difficult to resist the view that the PCRC’s report is a damp squib on the big issues. It offers little new on the key question of whether parliamentary supremacy could or should be retained under a new constitutional document. To be fair, it is unrealistic to expect a cross-party select committee, midway through a larger inquiry, to say much more on this contentious issue. In the press release accompanying today’s report, the committee’s chair Graham Allan is quoted as saying “The Committee expects to publish the results of its wider inquiry into codifying, or not codifying, the UK’s constitution in the summer.” Let’s see.

In my written evidence to the committee I argued for political realism in the debate about the role of the judiciary. I said that, thinking about the topic of judges in the constitution generally, it is possible to envisage a range of possible roles.

> *At the maximalist end of the spectrum would be a design that (for example) empowers the judges to adjudicate on the constitutionality of Acts of the UK Parliament with a remedial power to quash Acts that are incompatible with the UK Constitution; the UK Constitution might also include legally enforceable socio-economic rights (to health, housing, education and so on); there might also be ‘abstract’ judicial review of bills before they receive Royal Assent. A design of this sort would involve a shift in the balance of power to decide matters of national interest away from the UK Parliament and Government towards the courts.*

> *A minimalist design of the judicial role in the UK Constitution would not give the courts power to quash Acts of Parliament (so preserving the existing principle of parliamentary supremacy), would avoid creating justiciable socio-economic rights (confining rights to the civil and political ones familiar from the European Convention on Human Rights currently incorporated into national law by the Human Rights Act 1998), and would not have a system for abstract judicial review of bills.*
>
> *Where on the maximalist-minimalist spectrum a UK Constitution should sit has to depend on (a) efficacy and (b) political acceptability. Efficacy is concerned with what is needed, from a 'technical' legal perspective, for the UK Constitution to make a real improvement compared to current constitutional arrangements. Political acceptability is about being realistic as to what political elites and the general public would find attractive or tolerable.*
>
> *In the current political climate it is difficult to imagine that mainstream political opinion would accept an enlargement of the role of judges in adjudicating on legal questions that relate to controversial matters of public policy. The existing powers of courts under the Human Rights Act 1998 and in judicial review claims are regularly called into question by members of the Government and have few champions within Parliament. There is little public understanding of the role of courts in these areas and the constitutional function of the judges is routinely disparaged and misrepresented in the press. This political background against which the continuing debates about a UK Constitution take place is unlikely to change in the foreseeable future. Politically realistic constitutional reformers should therefore favour a minimalist role for judges in a codified constitution and provide reassurance to sceptics and opponents of judicial power that adoption of a UK Constitution need not involve the judges in novel legal tasks.*

I stick to that view. At a time when the government, including the Lord Chancellor, find judicial review of administrative action unpalatable, it is not practical politics to argue for greater powers for the UK courts to strike down "unconstitutional"Acts of Parliament. Anti-judicial review sentiments were not invented by the present coalition government. Under previous administrations, ministers did not see the point of it. In 2003, David Blunkett MP, when a minister in Tony Blair's Labour government, captured what I sense to be the dominant view of all recent governments: "Frankly, I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them".

This article has previously appeared on UK Constitutional Law Blog and is crossposted here with kind permission.

SUGGESTED CITATION Le Sueur, Andrew: *Imagining judges in a written UK Constitution, VerfBlog,* 2014/5/14, http://verfassungsblog.de/imagining-judges-written-uk-constitution/.

The tide of interest (among those who care about these things) in the idea of a written, codified constitution for the United Kingdom rises and falls. At the moment the tide is quite high, but certainly not high enough to flow into the estuaries of government policy making.

In 2010, Richard Gordon QC —a public law scholar-practitioner at Brick Court Chambers, London —wrote a book length blue print for a codified constitution (though expressing himself tentatively in terms of aiming to stimulate a debate). In *Repairing British Politics*, he rejects parliamentary supremacy as a defining principle and envisages judges having broad and deep powers to enforce the constitution. As my Essex colleague Anthony King put it in a review of the book: "By implication — and notwithstanding a passing reference to 'the available resources of the State'— unelected judges would even have the power to order other authorities to provide citizens with the aforementioned food, water, clothing, housing and free health and social care services".

Meanwhile, across the road at the LSE, Conor Gearty is leading a "trailblazing project that invites members of the public to participate in, offer advice on and eventually to draft a new UK constitution through crowdsourcing". On Thursday 26 June 2014, the project will be hosting a "Constitutional Carnival"when "All those involved in the

project, and many others joining for the first time, will be invited to come together to have their say on what should be included in a UK constitution". One session will be on "Where should judges fit in a written constitution?". It will be interesting to see what emerges.

The latest contribution to the debate comes today from the House of Commons Political and Constitutional Reform Committee, which publishes its report on *Constitutional role of the judiciary if there were a codified constitution* (14th report of Session 2013-14, HC 802). Chaired by veteran Labour MP Graham Allen, this cross-party select committee has been toiling away since it was set up in June 2010 "to consider political and constitutional reform, scrutinising the work of the Deputy Prime Minister in this area". Two major planks of Nick Clegg's agenda have fallen off the lorry since then: House of Lords reform and an alternative vote electoral system for the House of Commons. With time on its hands to mull over the bigger picture, the PCRC launched a wide ranging inquiry in September 2010 on "Mapping the path to codifying — or not codifying — the UK's Constitution", supported by researchers at the Centre for Political and Constitutional Studies at King's College London. Today's report on the role of the judiciary is one aspect of that inquiry.

The PCRC's report starts by acknowledging that the British judiciary already have a role in relation to constitutional matters, quoting examples I gave in my written evidence:

> *determining legal disagreements about the respective powers of different institutions within the constitution, for example between the UK Parliament and the UK Government, or between the central and local government;*
>
> *dealing with legal questions about the division of powers between the UK and the European Union, under the guidance of preliminary rulings by the European Court of Justice;*
>
> *adjudicating on legal questions about the exercise of powers by executive and legislative institutions in Scotland, Wales and Northern Ireland in accordance with the devolution settlements created by the UK Parliament;*
>
> *protecting fundamental rights of individuals, including those in the Human Rights Act 1998, taking into account the case law of the European Court of Human Rights. […]*
>
> *judicial review of executive action and delegated legislation, ensuring that public bodies remain within the powers conferred on them by Acts of Parliament and operate in accordance with judge-made legal principles of (for example) fairness and rationality.*

The report goes on to "welcome the fact that the Constitutional Reform Act 2005 enshrined judicial independence in law".

From there, however, the committee feels unable to say much more about what would change, in relation to the judiciary, if there were to be a written constitution:

> *The role of the judiciary would undoubtedly change should the UK adopt a codified constitution, but the precise nature of that change will be difficult to assess until there is an agreed definition of the current constitutional role of the judiciary. In our terms of reference we set out to explore the current constitutional role of the judiciary but this needs further work.*

That's quite right. There are a number of different ways in which the British constitution could be "written"and each model —including a non-legal constitutional code, a consolidation Act bringing together current statute law on the constitution into a single enactment, and a full blown constitution —would have different implications for the role of judges.

Having rehearsed some well trodden pros and cons of parliamentary supremacy (and whether it should or indeed could be retained in a written constitution), the PCRC expresses interest in the idea (which I share) of a "declaration of constitutionality" modelled on similar lines to section 4 of the Human Rights Act 1998, which would give courts power to declare that an Act of Parliament is inconsistent with a norm of the constitution without striking down the offending provision. It would then be left to government and Parliament to decide how to respond.

In a statement that will I'm sure provide inspiration to setters of undergraduate essay questions in years to come, the committee states "Before the UK could move towards a codified constitution there would need to be a precise definition of the 'rule of law"'. I am not sure that is right: arguably, the committee gets this back to front. A better way of understanding the umbrella concept of the rule of law is to say that it includes what is written down in a constitution.

Sharing a view previously expressed by the House of Lords Constitution Committee, the PCRC shows little appetite courts having power to undertake pre-enactment review of legislation. Nor is there much support for setting up a specialist constitutional court: based on the evidence received (including mine), the report concludes that "the Supreme Court could adjudicate on constitutional matters".

All in all, it is difficult to resist the view that the PCRC's report is a damp squib on the big issues. It offers little new on the key question of whether parliamentary supremacy could or should be retained under a new constitutional document. To be fair, it is unrealistic to expect a cross-party select committee, midway through a larger inquiry, to say much more on this contentious issue. In the press release accompanying today's report, the committee's chair Graham Allan is quoted as saying "The Committee expects to publish the results of its wider inquiry into codifying, or not codifying, the UK's constitution in the summer." Let's see.

In my written evidence to the committee I argued for political realism in the debate about the role of the judiciary. I said that, thinking about the topic of judges in the constitution generally, it is possible to envisage a range of possible roles.

> *At the maximalist end of the spectrum would be a design that (for example) empowers the judges to adjudicate on the constitutionality of Acts of the UK Parliament with a remedial power to quash Acts that are incompatible with the UK Constitution; the UK Constitution might also include legally enforceable socio-economic rights (to health, housing, education and so on); there might also be 'abstract' judicial review of bills before they receive Royal Assent. A design of this sort would involve a shift in the balance of power to decide matters of national interest away from the UK Parliament and Government towards the courts.*
>
> *A minimalist design of the judicial role in the UK Constitution would not give the courts power to quash Acts of Parliament (so preserving the existing principle of parliamentary supremacy), would avoid creating justiciable socio-economic rights (confining rights to the civil and political ones familiar from the European Convention on Human Rights currently incorporated into national law by the Human Rights Act 1998), and would not have a system for abstract judicial review of bills.*
>
> *Where on the maximalist-minimalist spectrum a UK Constitution should sit has to depend on (a) efficacy and (b) political acceptability. Efficacy is concerned with what is needed, from a 'technical' legal perspective, for the UK Constitution to make a real improvement compared to current constitutional arrangements. Political acceptability is about being realistic as to what political elites and the general public would find attractive or tolerable.*
>
> *In the current political climate it is difficult to imagine that mainstream political opinion would accept an enlargement of the role of judges in adjudicating on legal questions that relate to controversial matters of public policy. The existing powers of courts under the Human Rights Act 1998 and in judicial review claims are regularly called into question by members of the Government and have few champions within Parliament. There is little public understanding of the*

> *role of courts in these areas and the constitutional function of the judges is routinely disparaged and misrepresented in the press. This political background against which the continuing debates about a UK Constitution take place is unlikely to change in the foreseeable future. Politically realistic constitutional reformers should therefore favour a minimalist role for judges in a codified constitution and provide reassurance to sceptics and opponents of judicial power that adoption of a UK Constitution need not involve the judges in novel legal tasks.*

I stick to that view. At a time when the government, including the Lord Chancellor, find judicial review of administrative action unpalatable, it is not practical politics to argue for greater powers for the UK courts to strike down "unconstitutional"Acts of Parliament. Anti-judicial review sentiments were not invented by the present coalition government. Under previous administrations, ministers did not see the point of it. In 2003, David Blunkett MP, when a minister in Tony Blair's Labour government, captured what I sense to be the dominant view of all recent governments: "Frankly, I'm personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them".

This article has previously appeared on UK Constitutional Law Blog and is crossposted here with kind permission.

SUGGESTED CITATION Le Sueur, Andrew: *Imagining judges in a written UK Constitution, VerfBlog,* 2014/5/14, http://verfassungsblog.de/imagining-judges-written-uk-constitution/.